FILED
NOV 3 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. McKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Petition for rehearing	2
Application for summary relief to compel Circuit Court to pass on jurisdiction under Third Count	2
Opinion suppressing reference to that count	3
Application for summary relief to enforce right to original jurisdiction in accordance with precedent	3
Decisions of this Court violated by action of Circuit Court	4
Federal Law supreme under the Constitution	5
Nature of the judicial function	6
Process available for summary relief	7

Table of Authorities Cited

Cases

	Pages
California Bank v. Kennedy, 167 US 362	4
Chesbrough v. Woodworth, 244 US 72	3, 4
Chicago Life Ins. Co. v. Needles, 113 US 574	4
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403	4, 6
Jones National Bank v. Yates, 240 US 541	4
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501	4
Siler v. Louisville & Nashville RR Co., 213 US 175	4
Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548	4
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33	4
The Fair v. Kohler Die Co., 228 US 22	4
Wyman v. Wallace, 201 US 230	4

Statutes

Judicial Code:	
Section 24	4, 5
Section 240	3, 6
United States Constitution:	
Article III, Sections 1 and 2	4, 5
Article VI	4, 6
Amendment V	4, 6
28 USCA 41	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,

Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke, the petitioner above named, hereby applies to this Court for a rehearing and reconsideration of the order entered October 9, 1944, denying application for writ of certiorari.

First ground.

Petitioner applies for summary relief and for the issuance of appropriate process to compel the Circuit Court of Appeals for the Ninth Circuit to render a decision and to prepare and file an opinion in writing disclosing the action of said Court upon the following question of law upon which such Court failed and refused to pronounce judgment:

> *Whether the third count of petitioner's complaint presents a cause of action arising under federal law, within the jurisdiction of the United States District Court, for the Northern District of California.*

Wilful Refusal to Pronounce Judgment.

During oral argument of this matter, Circuit Judge Healy made the following statement from the bench:

> *"The third count in this case is the one that gives me difficulty. I will confess that, I do not know about my associates. Neither of you has satisfied me that it does or does not state a cause of action that is cognizable by a Federal Court."*

This statement is part of the transcript on oral argument, on file as part of the records of the Circuit Court. Same appears at page 11 of the affidavit filed in this Court in support of motion for enlargement of record.

The third count of petitioner's complaint appears at R 28-33. It is impossible to ascertain from the opinion, that our pleading contained a cause of action based upon the publication of an untrue condition report.

It is impossible to determine from that opinion, that the third count of this pleading set up a liability claimed to fall within the principles announced by this Court, per Justice McKenna, in *Chesbrough v. Woodworth,* 244 US 72.

The opinion now on file wilfully and deliberately suppresses reference to that controversy, and to the decision above cited.

We apply for a rehearing, for reconsideration of the matter, and for issuance of summary process to compel the Circuit Court of Appeals for the Ninth Circuit to render a true and adequate opinion which will pass upon that question.

Second ground.

Petitioner applies for summary relief by such memorandum opinion, order, or summary process as this Court may have power to issue under Section 240 of the Judicial Code, to compel the Circuit Court of Appeals for the Ninth Circuit, and the United States District Court, for the Northern District of California, Southern Division, to comply with the following provisions of Federal

Law under which petitioner is entitled to a determination of his case on the merits in said District Court, viz.:

United States Constitution Article III, Sections 1 and 2; Article VI, and Amendment V.
Judicial Code, Section 24 (28 USCA 41).

Petitioner also applies for such summary relief to obtain compliance with the following decisions of this Court under which such jurisdiction is recognized, viz.:

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403;
Chicago Life Ins. Co. v. Needles, 113 US 574;
California Bank v. Kennedy, 167 US 362;
Wyman v. Wallace, 201 US 230;
Siler v. Louisville & Nashville RR Co., 213 US 175;
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501;
The Fair v. Kohler Die Co., 228 US 22;
Jones National Bank v. Yates, 240 US 541;
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;
Chesbrough v. Woodworth, 244 US 72;
Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548.

Statement in Support of Application.

In denying an application for unrestricted review by certiorari, this Court has failed to act with respect to matters which are not subject of a discretion. Article VI of the Constitution provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . ."

Petitioner had an absolute right to file his suit in the United States District Court for the Northern District of California. That right was guaranteed by Section 24 of the Judicial Code. That section is a *law of the United States*. That law was made *in pursuance* of a provision of the Constitution of the United States, viz.: Article III, Sections 1 and 2, which provide:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .
>
> "The Judicial Power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ."

The meaning of these provisions is settled.

That meaning is established by the decisions above cited.

Petitioner's case comes directly within those precedents. It is a case requiring construction and interpretation of Federal law. It is a case involving violation of a duty alleged in good faith to arise under a Federal law. It is a proceeding to enforce a specific remedy claimed in good faith under a Federal statute.

This Court has deemed it unnecessary to reexamine those precedents. That ruling necessarily presents, as a corollary, a question upon which the Court should act, viz.: Enforcement of existing law to guarantee petitioner the same right to Federal jurisdiction which is recognized and accorded to other litigants under like conditions.

Due process under the Fifth Amendment requires recognition and enforcement of that right.

The supremacy of Federal law under Article VI requires enforcement of that right.

Nature of Judicial Function.

Petitioner has invoked the jurisdiction of this Court to obtain relief. The duty created thereby differs from that imposed on a legislative or other body holding merely a discretionary power. (*Cohens v. Virginia,* 19 US 264 at 403.)

Process Available.

Under Section 240 of the Judicial Code, this Court has broad powers of supervision over lower Federal Courts. It may grant full review. It may grant a limited review. It has power to file a memorandum opinion, or order, in a case where the law is settled and a lower Court has exhibited disobedience of precedent. There is power to grant a writ conditionally—to deal with this situation by an order to show cause, or by putting the matter on the summary docket.

By mandamus or by limited process under Section 240 of the Judicial Code, this Court has power to enforce compliance with its decisions.

Petitioner applies for such process and for issuance of an appropriate order requiring the Circuit Court to set aside its judgment, and commanding the District Court to determine, on the merits, all questions disclosed by the pleading now on file in said Court.

Petitioner has relied, to his prejudice, upon the decisions cited. A miscarriage of justice will result in case of a failure to grant this relief.

In the alternative, petitioner applies for a rehearing and reconsideration of the order denying certiorari and for a hearing in this Court upon any questions which are not deemed to be settled by precedent.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for rehearing and for relief under Judicial Code, Section 240, is well founded; and that the same is presented in good faith and not for purposes of delay.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioner.